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AUTHOR Huffman, John L.; Trauth, Denise M.
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ABSTRACT

The United States Supreme Court has recently begun to establish the right of consumers to receive certain commercial information and the right of proprietors of information to disseminate it. Simultaneously, there is a movement under way by administrative lawmaking bodies, professional associations, and citizens' groups to place advertising under a number of restrictions in what is perceived as the best interest of society. While litigation aims at protecting commercial speech that conveys information about the price and nature of services and products, this movement intends to restrict or inhibit the advertising of certain products and services, especially over television. Broadcast advertising directed to young children, or for products containing saccharin, or promoting legal services are among those for which banning is being advocated by those who base their arguments on an increased awareness of the importance and influence of advertising in contemporary society. Conflict between these two opposing points of view might be forthcoming. (DF)

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The First Amendment Status of Advertising: A Possible Source of Conflict?

by

John L. Huffman, Ph.D.

and

Denise M. Trauth, Ph.D.

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Dr. John L. Huffman is Associate Professor of Journalism, School of Journalism, Bowling Green State University, Bowling Green, Ohio, 43403.

Dr. Denise M. Trauth is Assistant Professor of Speech Communication, School of Speech Communication, Bowling Green State University, Bowling Green, Ohio, 43403.

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The U.S. Supreme Court is currently in the process of establishing a revolutionary doctrine that assures the right of consumers to receive certain information and the right of proprietors of the information to disseminate it. In establishing this doctrine, the Court is pulling together dicta from both "access" and "commercial speech" cases. At the same time, there appears to be a movement under way in some segments of society that in many ways is in direct conflict with the Court's developing doctrine. The resolution of this conflict may have profound implications for the future of advertising in the United States.

The Supreme Court's Doctrine

The first major case in the enunciation of this new doctrine, Kleindiest v. Mandel,[1] litigated by the Court in 1972, sprang from the denied request of a Belgian Marxist theoretician for temporary admission to the United States for the purpose of participating in several academic conferences. Mandel and the group of American university professors who wished to hear the Belgian speak appealed the denial and contended that the First Amendment was violated by the statute used to refuse Mandel's entry.

Although the high Court denied Mandel's right to enter the U.S., it took this opportunity to reinforce the contention of the appellees—a point the Court itself had made in several earlier cases:[2] the right of citizens to receive information is indeed contained within the ambit of the First Amendment.

In many ways, Kleindiest vs. Mandel, in dealing with the right to receive political information, was a philosophical vestige of the Sixties. All subsequent major cases in the development of the new doctrine emanated not from movements to receive political information, but from ones to receive commercial messages.

In a second major case, Bigelow v. Virginia,[3] the right of a newspaper to carry certain kinds of advertising was at issue. Although abortion during the first trimester of pregnancy was held lawful by the U.S. Supreme Court in 1973, the state of Virginia continued to enforce a statute which prohibited encouraging or prompting abortion through advertising. Bigelow, managing editor of a weekly newspaper in Charlottesville, carried an advertisement for a New York abortion service and was convicted of violating the Virginia law.

In reversing Bigelow's conviction, the Supreme Court deviated from an earlier line of cases which had placed commercial speech beyond the scope of the First Amendment, and established the doctrine that speech is not stripped of its constitutional protection merely because it appears in the form of a paid political advertisement.

Bigelow is important not only because it establishes protection for commercial messages but also because it justifies that protection on the basis of the public's need for the information contained therein. In so doing, the Court erases the theretofore important legal distinction between speech falling into the political or public interest (i.e., speech necessary for the maintenance of democracy) and therefore protected category, and speech falling into the commercial (i.e., speech not related to self-government) and therefore non-protected category.[4] Thus the Court is admitting that at times political and commercial speech may be one and the same.

The rationale for affording Constitutional protection to commercial speech was re-examined and expanded in a third major case, Virginia State Board of Pharmacy v. Virginia Consumer Council.[5]

Pharmacists had long been part of an elite group of professionals including medical doctors, lawyers and Certified Public Accountants, who refused to allow their membership to advertise their services under pain of expulsion from the professional society. This prohibition on advertising by pharmacists was challenged in the present case by a group of prescription drug users who felt that their constitutional rights were violated by the ban.

In supporting the consumers' contention, the Supreme Court stressed the fact that there are two addressees of First Amendment protection: the disseminator and the receiver of information.

The Court reaffirmed this when it answered the assertion of the dissent that no right to receive the information that another wants to disseminate exists—at least not when the person objecting could obtain the information in another way, in this case by calling several pharmacies and asking about prices. The Court said: "We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated."[6]

Although the dissent in this case seems to be focused on the distribution of information, the motivation behind this focus is an attitude toward commercial speech. In Valentine v. Chrestensen[7] the high Court had ruled that speech which is wholly commercial is outside the ambit of the First Amendment. Although in the thirty-four years since that ruling the Court had faced the question of

constitutional protection for commercial messages several times and had even begun in recent years to afford some such protection to advertisements, as in Bigelow, it had never explicitly brought commercial speech under the mantle of the First Amendment, partly because it had always been able to attach the constitutional shelter to some "editorial" element in the advertising copy. In Bigelow, this requirement was satisfied by the Court's belief that some Virginians would be interested in the advertisement for abortion due to a curiosity regarding the laws of other states.

In the Board of Pharmacy case, because no argument was made favoring protection for the advertisement based on viewing some element in it as editorial matter, the Court felt compelled to face the issue squarely.

Quoting prior cases that dealt with the issue of constitutional protection for commercial speech, the Court noted, "Our question is whether speech which does 'no more than propose a commercial transaction,'. . . is so removed from any 'exposition of ideas' . . . and from 'truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of Government,'. . . that it lacks all protection. Our answer is that it does not."[8]

Although this case is usually remembered because it brought commercial advertising under First Amendment protection and because it broke the barrier that had kept members of professional societies from advertising, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council went a long way toward securing the rights of consumers interested in receiving commercial messages. The Court did this by establishing the fact that many Americans' interest in commercial information may be keener than their interest in political issues. And this interest may be based not only on personal preference but also on economic realities: "Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly

the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist where their scarce dollars are best spent. When drug prices vary as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of pain or the enjoyment of basic necessities."[9]

The Court went on to upgrade the status of commercial information by explaining that the "public interest element," ordinarily considered a precondition to affording constitutional protection to any form of speech, is inherent in advertising of the sort at issue: "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of information does not serve that goal."[10]

In this eloquent defense of advertising's value in a capitalistic democracy, the Court seems to be retiring the dichotomy it begot thirty-four years before in Chrestensen between speech in the public interest category--speech which is necessary for the maintenance of democracy--and speech in the commercial category--speech which is not related to self-government.

Lest there be any question that this was indeed the intent of the Court, it took the opportunity to apply the reasoning of Virginia State Board of Pharmacy to another set of facts when it adjudicated a case dealing with advertising by attorneys, Bates v. State Bar of Arizona.[11]

Bates grew out of a complaint filed by the Arizona State Bar Association against two attorneys who violated a State Supreme Court disciplinary rule by advertising their legal services in a newspaper. The Arizona State Supreme Court upheld the bar association conclusion.

In reversing the decision of the high Court of Arizona, the U.S. Supreme Court began with an affirmation of its judgment in Virginia State Board of Pharmacy that speech should not be denied constitutional protection "merely because it proposed a mundane commercial transaction."[12] But the Court was not content to simply re-assert protection for commercial speech. It went on to justify this protection by elaborating on the theme of consumer needs argued so effectively in the Virginia case: "The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day . . . And commercial speech serves to inform the public of the availability, nature and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system." (Citations omitted.)[13]

This acknowledgment on the part of the Court that when advertising fulfills the informational needs of consumers it serves an "indispensable" role in the smooth functioning of our free enterprise system reflects the Court's consciousness of an important fact: in the second half of the 1970's, the

attention of many Americans is not focused on the philosophical/political concerns of the 1960's but rather is concentrated on the conditions of economic survival.

In a decision in February of 1979, the Court, while denying the extension of its new commercial speech First Amendment doctrine to the area of trade names, took the occasion to reiterate its belief that commercial speech that conveys information about the price and nature of services and products is indeed protected.[14] The Court did note that restrictions on the time, place or manner of advertising might be permissible.

Advertising Restrictions

Ironically, it is at this time when the relative position of advertising as a form of free speech has been elevated and its significance noted by the Supreme Court that we see the growth of counter movements in several sectors--movements, in some instances triggered by these very cases, aimed at restricting or inhibiting the advertising of certain products and services.

Although these two developments are serving opposite purposes, both spring from the same source: they are based on an increased awareness of the importance and influence of advertising in contemporary society.

Most groups or individuals attempting to curb a type of advertising appear to focus their attention against radio and television commercials, apparently because of a belief in the assumed power of the electronic media to achieve certain effects compared to that of the print media. The movement that most typifies this conviction is one aimed at restraining advertising directed toward children.

A number of disparate groups are presently lobbying to control the kinds and number of commercials directed toward children. Legislatures in California

and New York are considering laws that would regulate children's television advertising. The public interest group Action for Children's Television has recently received a 40,000 dollar grant from the Rockefeller Family Fund to aid its attempt to limit the number and kinds of advertisements broadcast during Saturday morning television. And the National Association of Broadcasters has asked the former chairman of the Federal Communications Commission Richard Wiley to update the children's television guidelines for the NAB Television Code.

But the organization most likely to have an impact on the exposure of children to television commercials is the Federal Trade Commission under the leadership of consumer-protection-oriented Michael Pertschuk. The FTC Chairman's drive to regulate advertising aimed at children is based on the desire to debunk the assumption that the standards applied to television commercials directed at children need be no different from those governing print ads directed at adults: "Children are not sophisticated consumers. One advertising man described the role of ads directed toward kids as 'guided missiles.' That's a very vigorous image. It raises the question of whether children of 2, or 3, or 4 are properly the subjects of well-developed techniques of promotion and manipulation through the most powerful medium the world has ever known."[15]

The Federal Trade Commissioners are presently studying an FTC staff report on television advertising to children which focuses on commercials for products high in sugar which are aimed at young children. This report suggests that the Commission institute a rulemaking procedure to determine whether it should (a) ban all television advertising aimed at children under eight years of age, (b) ban television advertising of products that pose a serious dental health risk to children under twelve years of age, and (c) require that advertisers of products high in sugar content balance these commercials with nutritional and/or health disclosures paid for by the advertisers themselves.[16]

The staff report argues that such rules would not violate the First Amendment rights articulated in Bigelow, Virginia State Board of Pharmacy and Bates, since advertising aimed at children can be distinguished from other types of commercial speech precisely because of the primary role advertising plays in our society: according to the FTC staff, the Supreme Court brought commercial speech under the First Amendment because the Court viewed material presented in the advertisements in question as essential to rational market behavior. "Indeed, in those cases, individuals denied access to such information might undergo serious personal hardships due to their inability to act rationally in the market."[17]

The staff report argues that since "children lack the maturity to make difficult consumer decisions based on an assessment of factual information,"[18] coupled with the fact that (p)resent televised advertising for sugared products to children is also 'false,' 'misleading,' and 'deceptive,'"[19] banning television commercials aimed at children would not violate the rational-market-behavior theory of protection for advertising propounded in Bates and its forerunners.

Although this argument may be valid when applied to advertisements aimed at children, its logic cannot be employed in an attempt to restrain commercial messages aimed at adults. Two recent efforts to limit advertising of certain products and services provide examples of various arguments used to restrict the flow of commercial information.

The first deals with an issue analogous to the one presently before the FCC: a movement to restrict radio and television advertisements for products containing saccharin without banning the products themselves. In March, 1977, the Pure Food and Drug Administration decided that since saccharin was determined to be carcinogenic in laboratory tests conducted by the Canadian government, products containing it should be removed from markets in this country beginning in July, 1977.

Because of questions regarding the validity of the Canadian tests plus the popularity of sweet but sugarless foods in America, an outcry ensued from both the public and the food industry. In an attempt to reach a compromise, bills were introduced into both Houses of Congress which mandated more study of the issue during an eighteen-month moratorium on thr product ban. An amendment to the Senate bill called for restricted saccharin product advertising on radio and television during the moratorium. The rationale for the amendment, sponsored by Senator Edward Kennedy, was that consumers should be told in advertising that products containing saccharin may increase the risk of getting cancer.

Although both Houses defeated measures to restrict saccharin product advertising, it should be noted that the Senate Amendment which was to require the inclusion of a health warning in all broadcast ads for artificially sweetened products was defeated only after intense and costly lobbying on the part of broadcasters[20] by the not-so-wide margin of fifty-two to forty-two. A second Senate vote to reinstate the amendment and end all saccharin product advertising on radio and television was defeated fifty-five to thirty-nine.[21]

A second attempt to limit the flow of commercial messages to adults is apparent in the responses of the individual states to the aforementioned Bates case.

Because the facts of Bates posed the issue of advertising in newspapers, the Court not only did not deal with the question of extending constitutional protection to radio and television commercials promoting legal services but also pointed out that "the special problems of advertising on the electronic broadcast media will warrant special consideration."[22] The justices left it to state supreme courts to stipulate procedures that attorneys who wish to advertise in the broadcast media should follow in grappling with the "special problems" of radio and television advertising.

At its annual convention in August, 1977, the American Bar Association discussed the issue and recommended that the states allow lawyers to advertise via print media and radio, but that left the question of television commercials in limbo. The concern of the ABA, and that of many individual lawyers, appears to be that television advertising will diminish the dignity and professionalism of the law because of the entertainment context of virtually any television commercial coupled with what some ABA members consider the tastelessness of many commercials.

As of this writing, only Nebraska and Ohio have adopted rules governing advertising by lawyers that permit radio and television commercials.

Various state medical associations have begun to emulate the bar associations in moving to restrict certain kinds of advertising in the wake of Bates. The California Medical Association, for instance, has approved a stringent set of guidelines controlling print advertising and ruling out broadcast advertising entirely.[23]

Conclusion

It would seem that a number of important elements in society -- administrative lawmaking bodies, various professional associations, and concerned citizen groups -- are determined that advertising must be placed under a number of restrictions if society is to be best served. It would also seem that the Supreme Court is moving in a direction that would culminate in the removal of most restrictions on commercial advertising. At some point these differing philosophies will come into more direct confrontation, and the resolution of that confrontation will have major implications for both advertising and the media it supports.

Footnotes

1 408 U.S. 753(1972).

2 "It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and the press) . . .necessarily protects the right to receive. . .' Martin v. City of Struthers 319 U.S. 141(1943), p. 143. . ." Stanley v. Georgia 394 U.S. 557(1969), p. 564.

3 421 U.S. 809(1975).

4 For a discussion of the role of the First Amendment in guaranteeing our capacity for self-government see Alexander Mieklejohn, Free Speech and Its Relation to Self Government (New York: Harper, 1948).

5 425 U.S. 748(1976).

6 Ibid., p. 757 note 15.

7 316 U.S. 52(1942).

8 425 U.S. 748(1976), p. 762.

9 Ibid., p. 763.

10 Ibid., p. 765.

11 433 U.S. 350(1977).

12 Ibid., p. 364.

13 Ibid.

14 "Justices Uphold Texas Optometry Curbs, Let Stand Sealy, Republic Steel Decisions," Wall Street Journal, Vol. LIX, No. 90 (February 22, 1979), p. 4.

15 John Weisman, "We will be embarking on a long fight with advertisers," TV Guide, Vol. 25 (November 12, 1977), p. 10.

16 "Federal Trade Commission Staff Report on TV Advertising to Children," Advertising Age, Vol. 49 (February 27, 1978), pp. 73-74.

17 Ibid., p. 76.

18 Ibid.

19 Ibid.

20 "Saccharin ad ban suffers another set back by Senate," Broadcasting Vol. 46 (September 19, 1977), p. 42.

21 "Saccharin Legislation--Sweet Victory for Broadcasters," NAB Highlights, Vol. 3 (September 26, 1977), p. 1.

22 433 U.S. 350(1977) p. 384.

23 "California Ad Rules Established for Doctors," Advertising Age, Vol. 49 (April 3, 1978), p. 59.